United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-1290

To be argued by
PEYTON H. MOSS

ORIGINAL

IN THE

United States Court of Appeals

For the Second Circuit

UNITED RUBBER, CORK, LINOLEUM AND PLASTIC WORKERS OF AMERICA, AFL-CIO, an unincorporated association, and UNITED RUBBER, CORK, LINOLEUM AND PLASTIC WORKERS OF AMERICA, AFL-CIO, LOCAL 102, an unincorporated association,

Plaintiffs-Appellants,

against

LEE NATIONAL CORPORATION,

Defendant-Appellee.

BRIEF FOR DEFENDANT-APPELLEE

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NOTE

The following citation abbreviations are used herein:

"(A)"	Statement of Counsel or Trial Court or Other Non-Testimony Record References—Included in Appendix
"(Tr.)"	Statement of Counsel or Trial Court—Not Included in Appendix
"(Hess A)"	Name of Witness and Appendix Page Reference
"(Somo Tr.)"	Name of Witness and Original Transcript Page Reference—Not Included in Appendix
"(Ex. [A])"	Exhibit in Evidence and Appendix Page Reference
"(Ex.)"	Exhibit in Evidence—Not Included in Appendix

IN THE

United States Court of Appeals

For the Second Circuit

Docket No. 74-1290

UNITED RUBBER, CORK, LINOLEUM AND PLASTIC WORKERS OF AMERICA, AFL-CIO, an unincorporated association, and UNITED RUBBER, CORK, LINOLEUM AND PLASTIC WORKERS OF AMERICA, AFL-CIO, LOCAL 102, an unincorporated association,

Plaintiffs-Appellants,

against

LEE NATIONAL CORPORATION,

Defendant-Appellee.

BRIEF FOR DEFENDANT-APPELLEE

Preliminary Statement

This is an appeal by plaintiff, United Rubber, Cork, Linoleum and Plastic Workers of America, AFL-CIO ("plaintiffs" or "the URW International"), from so much of the judgment of the United States District Court for the Southern District of New York (Knapp, J.), entered November 7, 1973, as dismissed the Second Cause of Action of an Amended Complaint against defendant, Lee National Corporation ("Lee" or "the Company"), upon motion by

the Company under Rule 41(b) of the Federal Rules of Civil Procedure at the end of the plaintiffs' case (A1496-1502, 1503-4).*

Plaintiffs contend that the dismissal was improper because Judge Knapp "misconstrued the theory of law applicable to the subject litigation" was "overly influenced by the Mansfield opinion and failed to try the subject action de novo," and made findings of fact which were "clearly erroneous within the meaning of FRCP 52(a)" (see, *e.g.*, P.Br. pp. i-iii).** With respect to the last contention, plaintiffs particularly attack Judge Knapp's finding that Maurice Clairmont, acknowledged by plaintiffs to be "the key witness," was credible (see, *e.g.*, P.Br. p. 49; A1112, 1421, 1428).

Defendant contends that each of plaintiffs' contentions is entirely without merit.

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* There were originally three causes of action and two plaintiffs-appellants, the URW International and its Local 102 (see A6-32, 33-53; Notice of Appeal). However, Local 102 was a plaintiff only with respect to the First Cause of Action, dismissed by Judge Knapp in an opinion filed May 16, 1973 and plaintiffs have abandoned their appeal from that dismissal (see A1487; P.Br. pp. 2-3). The Third Cause of Action, also involving the URW International as successor to Local 227, was dismissed by Judge Mansfield in an opinion and order filed February 24, 1971, granting the Company partial summary judgment, and is also not involved in this appeal since plaintiffs have never challegend the correctness of that dismissal (P.Br. p. 2, footnote; see Tr. 1953-4).

Therefore, the only remaining plaintiff-appellant is the URW International as successor to its former Local 227, which represented the production workers at the Company's tire manufacturing plant at Conshohocken, Pennsylvania, where the Second Cause of Action—the sole subject of this appeal—arose (see page 3 below; P.Br. pp. 3-4). However, to remain consistent with the record below, the remaining plaintiff-appellant will be referred to herein as "plaintiffs".

** The "Mansfield opinion" referred to by plaintiffs is the opinion, filed February 24, 1971, by Judge Walter R. Mansfield (then a District Judge, now a Judge of this Court) on the Company's motion for partial summary judgment (A1442-60; 323 F. Supp. 1181).

The Issue Presented for Review

The issue on this appeal is whether the findings of fact which support the judgment below are "clearly erroneous" within the meaning of Rule 52(a) of the Federal Rules of Civil Procedure.

It is defendant's position that they are not.*

Statement of the Case

1. The nature of the case

At the beginning of 1963, the Company was producing automobile tires at its Lee Tire Division plant in Conshohocken, Pennsylvania, under a collective bargaining agreement (known as the Working Agreement) with plaintiffs' Local 227 ("Local 227" or "the Union") which set the wages, hours, and other working conditions for the Company's production and maintenance employees at that plant (PTO, A1468-71, pars. 1, 3, 4, 6; Ex. 35 [A1549-80]).** The Working Agreement was scheduled to expire on June 30, 1963 (PTO, A1472, par. 6; Ex. 35, p. 64 [A1549 at 1576]).

In addition to the Working Agreement, the Company and Local 227 had another agreement known as the Welfare Agreement (Ex. 36 [A1581-1606]), which among other things provided that "In the event that all operations at the plant covered by this Agreement shall be completely and permanently discontinued prior to the termination of this Agreement, a Special Distribution shall be payable to each employee" who fulfilled certain conditions (PTO, A1470-1, par. 5; Ex. 37 [A1607-9]). While the Welfare

* Insofar as plaintiffs brief purports to raise questions, never raised below, as to the correct theory of law and burden of proof applicable to the case and the alleged undue effect of Judge Mansfield's partial summary judgment opinion on the trial of the case (see P.Br. pp. 36-44), they will be treated as plaintiffs treated them, only in the Argument section of this brief.

** "PTO, A——, par. —" refers to the page and paragraph number of facts stipulated by the parties in the Pre-Trial Order herein.

Agreement's expiration date was June 30, 1966, it could be terminated by either party under certain conditions after May 1, 1964 (PTO, A1472, par. 6; Ex. 36, p. 64 [A1581 at 1605]).

This case involves plaintiffs' claim that the Company owes certain of its former Union employees the above-described Special Distribution although the Welfare Agreement was terminated pursuant to its terms on September 8, 1964, and the Company's Board of Directors did not authorize the permanent discontinuance of all manufacturing operations at the plant until almost three months thereafter (PTO, A1480-3, pars. 22-32).

Before, during, and after the trial, plaintiffs described the "essential theory" of their case to be that the Company "perpetrated a fraud" upon the Union by forcing a strike on July 16, 1963, with the intention never to reopen the plant and by thereafter conducting a "charade" to conceal that closure decision from the Union until after the Welfare Agreement was terminated (see, *e.g.*, Plaintiffs' Memorandum in Opposition to Motion for Summary Judgment, pp. 2-4; PTO, A1484-5; A79-80, 82-1, 83; Tr. 1805-6; A1087-8, 1092-3, 1098, 1105, 1109, 1396-8, 1420). Plaintiffs tried the case upon that theory (*ibid.*) and are now appealing from the District Court's decision that plaintiffs failed to persuade the court that it is more likely than not that this happened (A1496-1502; see A1122, 1438-9).

2. The course of proceedings

a. The Complaint and Amended Complaint

This action was commenced on April 22, 1966, by the filing of a Complaint which alleged the Company's breach of the Welfare Agreement by its failure to pay a Special Distribution on the complete and permanent discontinuance of all operations at the Conshohocken plant on or about December 14, 1964 (A6 at 13-16, pars. 5, 7-11).*

* Note the paragraph 5 allegation that "on or about July 1, 1965, the [Company] ceased operations and then sold the aforementioned plant."

Some eighteen months later, an Amended Complaint was filed which set forth the same claim for a Special Distribution but omitted the original allegation of cessation of operations on a specific day in December 1964 (or July 1, 1965) and substituted therefor allegations that "On July 17, 1963, the employees represented by Local 227 at defendant's plant at Conshohocken, Pennsylvania, commenced a strike which was never settled with defendant," that "In fact and in effect said strike constituted a complete and permanent discontinuance of all operations at the plant within the meaning of" the Special Distribution provision of the Welfare Agreement, and that the Company's notification of its cessation of operations by Board of Directors' resolution of November 30, 1964, was "merely a recognition of the fact that operations had actually ceased at said plant as far back as July 17, 1963" (A33 at 41-4, pars. 6-11).

b. Judge Mansfield's Opinion on the Motion for Summary Judgment

On July 28, 1970, the Company filed a motion for partial summary judgment seeking dismissal of the Second and Third Causes of Action of the Amended Complaint (Defendant's Notice of Motion and Affidavit for Summary Judgment). On February 24, 1971, Judge Mansfield filed an Opinion and Order in which, after reviewing the contentions and affidavits of both parties, he declined to dismiss the Second Cause of Action claiming Company liability for the Special Distribution (A1442-60).

In the course of arriving at that conclusion, Judge Mansfield stated, among other things, that the "essential theory of the Union's case is that the Company perpetrated a fraud upon its Local by unilaterally imposing conditions which provoked and forced a strike, thus making it appear that the Company was shut down by unreasonable Union members striking over simple economic issues," during which strike the Company planned to terminate the Welfare Agreement and avoid the Special Distribution (*id.*, A1452). He went on to say that, in order to prevail, the Union "must prove that the discontinuance of plant opera-

tions by the Company actually occurred at or about the time when the strike commenced, which was on July 16, 1963,* rather than on November 30, 1964, when the Company's Board voted to discontinue operations" and that upon the record before him he felt the Union appeared to have "almost no chance at all of sustaining this heavy burden" (*ibid.*). He said the Union's claim appeared to be "but a belated rationalization" inconsistent with its earlier positions that the discontinuance of operations had occurred on December 14, 1964, or even later (*id.*, A1453-4), but that, "Notwithstanding the apparent flimsiness of plaintiff's claim," it did present an issue as to "whether the management purposely provoked or forced the Union into striking on July 16, 1963, with the intent of permanently closing down operations and never thereafter reopening" (*id.*, A1454).

c. Trial before Judge Knapp

i. Plaintiffs' first case

The trial contemplated by Judge Mansfield began before Judge Knapp, sitting without a jury, on January 23, 1973 (Tr. 1).** At the outset, plaintiffs requested and were granted permission to amend paragraph 8 of the Amended Complaint (A79). Plaintiffs' counsel agreed with the court that "The gist of the proposed paragraph is to permit you to do just what Judge Mansfield said you have to do in order to prevail," *viz.* to allege in substance that "the defendants precipitated or deliberately precipitated a strike * * * and that deliberate precipitation of the strike resulted or was just the means by which the defendant ceased operations of the plant and thereafter triggered the provisions of the contract that took effect on ceasing operations" (A79-80).

* "Or at least some time before September 8, 1964, the date when the Welfare Agreement was terminated" (A1442 at 1452).

** At pre-trial, the trial of the issue of damages was severed and postponed until after trial and determination of the issue of liability (Order Severing Trial of the Issue of Liability from the Trial of the Issue of Damages; see Tr. 4-5).

Following brief opening statements, plaintiffs presented as witnesses Charles Hess, former President of Local 227; George Vasko, Assistant General Counsel of the URW International at the time of the events involved in the case and now General Counsel; Robert Garber, former International Representative for the URW International assigned to the Lee negotiations; Kenneth Oldham, former Pension and Insurance Director of the URW International; and Ronny Fisher, its Director of Research, and also introduced numerous documents as exhibits (see Tr. 82-943, 1128-248a). At the conclusion of the examination and cross-examination of these witnesses which occupied ten trial days, plaintiffs rested (A606; A1496 at 1497).*

The Company then moved to dismiss (A1496 at 1497). During an off-the-record discussion of the schedule and procedure for the argument and determination of that motion, Judge Knapp suggested that if he reserved decision on that motion and the Company decided to rest as well "the Court might well give judgment for defendant" (A607, 609; A1496 at 1497). This possibility caused plaintiffs immediately to ask leave to reopen their case, which was granted, and they announced that on the next trial day they would call as a witness the Company's former Chairman and Chief Executive Officer, Maurice Clairmont (A607; A1496 at 1497-8).

ii. Plaintiffs' second case

Thereafter, the trial continued for an additional four days, during two of which plaintiffs examined Maurice Clairmont (whom the court permitted plaintiffs to treat as a hostile witness under Rule 43(b)) on all aspects of his prior business activities, his acquisition of control of Lee, and the events which occurred while he was actively directing the Company's affairs (see A610-976). In addition, plaintiffs called Michael Sabol, a former Field Representative for URW International who had had long-term dealings

* Plaintiffs also called Stanley Somo, former Vice President of Local 102, to testify and identify documents relating to the First Cause of Action, which is not involved in this appeal (Tr. 944-1129; see second footnote on page 2, above).

with the Company at the Conshohocken plant and had participated in most of the 1963 Working Agreement negotiating sessions, Walter Tarbutton, former Secretary of Local 227, and recalled Charles Hess and Ronny Fisher (see A977-1005, 1033-72; Tr. 1653-712). Plaintiffs also called Willard Heinrich, former Executive Vice President of Lee whose office had been at the Conshohocken plant and who had been intimately involved with the day-to-day operation of the plant and the Company-Union negotiations for a new Working Agreement and a revised Welfare Agreement (A1007). However, although the court also permitted plaintiffs to treat Heinrich as a hostile witness under Rule 43(b) (A1025-6), plaintiffs deliberately restricted their examination of Heinrich to the cost and availability of a particular piece of new machinery called a "tread tuber" and avoided any interrogation of Heinrich on the essential elements of plaintiffs' claims (see A1006-16, 1019-33).*

At the conclusion of plaintiffs' second presentation of evidence, the Company again moved to dismiss (A1073). In response to Judge Knapp's question to plaintiffs why he should not grant the motion, plaintiffs' counsel argued for several hours against the motion, an argument frequently punctuated by inquiries from the court with respect to various aspects of the case and the evidence (see Tr. 1785-962 *passim*). When plaintiffs' counsel concluded, the

* During this first reopening of plaintiffs' case, Local 227's former President, Charles Hess, was recalled primarily to testify that prior to the strike the Company had had on the premises, but uninstalled, a new "tread tuber" which, according to plaintiffs, would have entirely overcome certain production difficulties and would have allowed a general restructuring of the incentive rates throughout the plant (Hess A992-1005). Plaintiffs' theory about the tread tuber appeared to be twofold: (1) leaving it uninstalled was evidence that the Company had already decided, before the strike, to go out of business; and (2) not using its future availability as a bargaining tool in the Working Agreement negotiations proved the Company's intention not to come to an agreement (see A1080-7, 1400-9; Tr. 1810-1, 1933-8).

However, Heinrich testified (and supported his testimony by contemporaneous written proof) that well before the strike the Company, under Clairmont, had appropriated more than $200,000 to make the new machinery installable (see Heinrich A1008; Ex. 125A [A1916]), thus scotching plaintiffs' first theory; and plaintiffs' own later witness, Joseph Conway, testified that the existence of the tread tuber was not, in fact, an effective bargaining tool in the negotiations, thus scotching plaintiffs' second theory also (see Conway A1231-2, 1234, 1239-40; *cf.* 1356-7).

court announced the intention to dismiss the Second Cause of Action but delayed entry of an order to that effect until briefs were filed and a decision made on dismissal of the First Cause of Action which, because of its relative insignificance, had been "lost in the shuffle" (A1122-1, 1122-2, 1123).

Some three and one-half months later, on May 16, 1973, Judge Knapp filed an Opinion and Order which dismissed the First Cause of Action but requested briefs as to whether the case on the Second Cause of Action should be reopened to permit either side to introduce testimony on the question why defendant had failed to use the future availability of the new tread tuber as a bargaining tool in the Working Agreement negotiations to resolve the important issue of the Company's insistence upon the right to re-evaluate all the wage rates in the plant (A1487 at 1488, 1491; see footnote on page 8, above). Following the filing of the requested briefs on the "tread tuber as a bargaining tool" issue, Judge Knapp issued a Memorandum and Order, dated August 27, 1973, in which he reaffirmed his original position that he was "unpersuaded that plaintiffs have born [*sic*] their burden of proof on the present state of the record" (A1492).*

iii. Plaintiffs' third case

However, not content with accepting the record as plaintiffs had then made it, Judge Knapp announced that he had

* While plaintiffs' brief expresses ignorance of what prompted Judge Knapp's "two distinct and abrupt changes of direction" (see P.Br. pp. 29-31), it is clear that, in his constant solicitude to give plaintiffs every possible opportunity to establish their case, Judge Knapp's review of the record had made him feel there might be more than he had first thought in plaintiffs' argument that the tread tuber represented an important bargaining tool unused by defendant, but that the memoranda submitted on that issue had satisfied him to the contrary (compare A1487 at 1491 with A1492). His conclusion on that matter was subsequently confirmed by plaintiffs' witness Conway who, while obviously anxious to support plaintiffs' case, was finally constrained to admit to the court that the future availability of the tread tuber would not have been effective in resolving the negotiations (Conway A1280; see also 1207-10, 1231-2, 1234, 1239-40, 1356-7).

decided, if plaintiffs so desired, to reopen the case to permit them to offer the testimony of one Joseph J. Conway, the Company's long-time, but now retired, Personnel Director and chief Company negotiator in the 1963 and previous negotiations with the Union (*ibid.*). Judge Knapp had previously identified Conway to plaintiffs' counsel as someone who "would almost surely have had access to evidence of any conspiracy against plaintiffs that might have existed," whose testimony, Judge Knapp felt, "may well be most helpful in determining the issues posed by the second cause of action," and whose sympathies, Judge Knapp thought, "would most surely be with plaintiffs" (*ibid.*; A1496 at 1498-9). Accordingly, since plaintiffs' counsel did decide to call Conway, the trial resumed for a third round on September 19, 1973, to take Conway's testimony (*ibid.*; see A1133). His examination and cross-examination, including substantial inquiries by the court, occupied September 19 and 20 and part of September 21 (see A1133-384 *passim*).

At the conclusion of Conway's testimony, Judge Knapp announced a determination on his part, if plaintiffs' counsel wished, to acquaint them with his current views on the state of plaintiffs' case in order to give them an opportunity to address him directly on areas of disagreement and to help them to recognize the areas which they might do well to cover in the written brief they proposed to submit in opposition to the Company's long-standing, though still undecided, motion to dismiss (A1385-6). There ensued a lengthy dialogue between the court and plaintiffs' counsel covering practically every aspect of the case (see A1386-439). Finally, after stating that the view of the evidence he had just enunciated was all "subject to reconsideration, after you have had an opportunity to marshall your arguments in writing," Judge Knapp reserved decision on the motion to dismiss pending the filing of a brief by plaintiffs and thereafter, if the court considered it necessary, by the Company (A1439-41). Plaintiff filed such a brief (Plaintiffs' Memorandum in Opposition to Motion to Dismiss), but none was thereafter requested from the Company.

3. Disposition in the court below

On October 31, 1973, Judge Knapp issued an Opinion dismissing the Second Cause of Action and ordering judgment to be entered "dismissing the complaint in its entirety" (A1496-502). A judgment was thereafter entered to that effect (A1503-4).

The Facts Relevant to the Issue Presented

1. The Company and its Union agreements

As already briefly noted (see pages 3-4, above), the Company, through its Lee Tire Division manufactured automobile tires at its plant in Conshohocken, Pennsylvania, for distribution and sale throughout the country either through sales branches of its own or through the retail outlets of a few purchasers who sold Lee-built tires under their own names or labels (PTO, A1468-9, par. 1). At that plant the Company employed executives, general office personnel, salesmen, factory office employees, foremen, assistant foremen, supervisory employees, laboratory employees, production and maintenance workers, test drivers, and guards (*id.*, A1469, par. 2). The production and maintenance employees, test drivers, and guards were represented for collective bargaining purposes by Local 227 under a Working Agreement which set the wages, hours, and other working conditions for the covered employees (*id.*, A1469-70, pars. 3-4; Ex. 35 [A1549-80]; see page 3, above). None of the other employees at the plant was covered by a union contract (*ibid.*). The last Working Agreement between the Company and Local 227 was dated June 30, 1961, and was due to expire on June 30, 1963 (*ibid.*).

In addition to the Working Agreement, the Company and Local 227 were parties to another agreement known as the Welfare Agreement (PTO, A1470-1, par. 5; Exs. 36, 37 [A1581-1606, 1607-9]; see pages 3-4, above).* This provided various pension, insurance, and other benefits for the

* There was also a Supplemental Unemployment Benefits Agreement ("SUB") (Ex. 96A).

employees covered by the Working Agreement, including a Special Distribution to each covered employee who fulfilled certain conditions "In the event that all operations at the plant covered by this Agreement shall be completely and permanently discontinued prior to the termination of this Agreement" (*ibid.*). While the Welfare Agreement was not due to expire until June 30, 1966, it specifically provided for renegotiation by either party after May 1, 1964 (Ex. 36, p. 25 [A1581 at 1605], Art. V, pars. 6, 7). Failure to agree upon new terms within a stipulated time would permit either party to terminate the Welfare Agreement upon sixty days' notice (*ibid.*). In the event the Welfare Agreement was terminated, either party could cancel the Working Agreement also—at least until agreement was reached on the Welfare Agreement (*id.*, par. 8; see Ex. 35 [A1549 at 1577], §18.02).*

* Prior to 1961 the various Welfare Agreement benefit plans terminated at the same time as the then current Working Agreement (PTO, A1470-1, par. 5; see Hess A229-30). However, in the 1961 negotiations on both Agreements the Union negotiated a Working Agreement which expired in two years and a Welfare Agreement which lasted for five years (see Ex. 35, pp. 64-65 [A1549 at 1576-7], Art. 18; Ex. 36, pp. 24-25 [A1581 at 1604-5], Art. V, pars. 6-8; Oldham Tr. 1158). The Union wanted this arrangement so as to insure that if the employees struck to enforce demands for a new Working Agreement the Company would still owe them all the benefits provided in the Welfare Agreement (Vasko A324-5). It was for that precise reason that employers opposed different termination dates.

Also, in order to avoid being stuck with fixed Welfare Agreement benefits for five years without the possibility of bettering them, the Union in 1961 negotiated a provision permitting either party to reopen the Welfare Agreement once after May 1, 1964, with the right to terminate it, and the Working Agreement, in the event renegotiation was unsuccessful (Ex. 36, p. 25 [A1581 at 1605], Art. V, par. 7; Ex. 35, p. 64 [A1549 at 1576], §18.02; Hess A133-4, 230-2). The right to terminate the Working Agreement was, of course, crucial to the scheme since it would free the Union from its no-strike commitment and allow it to strike in support of its Welfare Agreement demands (see Ex. 35, pp. 18-19 [A1549 at 1554-5], Art. 4). That purpose is clearly evidenced by the final provision in each Agreement that as soon as agreement was reached on the reopened Welfare Agreement the Working Agreement would be automatically reinstated (see Ex. 36, pp. 24-25 [A1581 at 1604-5], Art. V, pars. 7-8; Ex. 35, pp. 64-65 [A1549 at 1576-7], §18.02).

In 1962, the Company tried to eliminate this great advantage to the Union by obtaining co-termination but the Union refused (Clairmont A907-9; Oldham Tr. 1162-3, 1167-8, 1194, 1199-200; see footnote, page 18, below).

2. Company status and position in the industry

Lee, established in 1915, was one of a number of smaller competing tire manufacturers, such as Cooper, Mansfield, Mohawk, Armstrong, and others, in a field dominated by the so-called "Big Four"—Goodyear, Firestone, B.F. Goodrich and U.S. Rubber (Hess A89; Clairmont A621; see Ex. 139A [A1974-2009]). All of these tire companies had been organized by the United Rubber Workers, and the pattern of collective bargaining in the industry was in general set in negotiations between the URW and the Big Four (Hess A89-90, 96-7, 135-8; Conway A1143; Clairmont A735). Thereafter, the various locals would, wherever possible, impose the Big Four settlement on their own smaller companies and then negotiate solutions to particular local problems, if any (*ibid.*). While various of the smaller companies had occasionally resisted imposition of the Big Four settlement upon them—even to the point of suffering a strike—Lee had never done so (Hess A135; Conway A1300-2, 1313; Clairmont A625; see Garber A465, 492).

For many years prior to 1962, Lee's management had been in the hands of a family named Garthwaite, whose senior member, A.A. Garthwaite, ran it with the assistance of his son, A.A. Garthwaite, Jr., and various long-time friends and employees (Clairmont A621-2; *cf.* Conway A1140, 1268; see Ex. 109A, footnote). Although for many years it had been a profitable operation (and for its competitors it continued to be so) its profitability, particularly in the tire division, began to decline in 1959, so that by 1961 its net income had gone down from $1,521,479 in 1959 to $279,253 for 1961 (compare Ex. 139A [A1974], Lee 1960, with *id.*, Lee 1962 at A1978; for Cooper, Mansfield and Mohawk comparable figures see Exs. 139A *passim;* 54A, pp. 3, 8; 62A, pp. 9-11 [A1974-2009; 1694 at 1695, 1700; 1746 at 1754-5]; Clairmont A621).

Lee's disappearing profitability, when its competitors were becoming ever more profitable, was apparently traceable to the Garthwaite administration's lack of effective management, which included an ineffectual and aging man-

agement team; delayed acceptance and production of the popular new two-ply tire; a sales distribution restricted almost exclusively to small, unprofitable branch operations; absence of any serious effort to replace the loss of Lee's largest customer, Phillips Petroleum, whose business amounted to almost one-half of Lee's total production and who had informed the Company in 1958 that it would decrease its purchases from Lee in yearly stages until it was entirely phased out in 1963; and a supine labor relations policy of meekly accepting the Big Four wage and fringe benefit increases without insisting in return upon corresponding increases in employee productivity (see, *e.g.*, Clairmont A622, 625-6, 629, 632-3, 641-2, 643-5, 720, 726, 764, 786-7, 899-900; Conway A1133-5, 1136, 1138, 1147, 1149, 1248-51, 1253, 1300-2, 1309-13; Hess A89-92, 96-7, 104-6, 119-20, 135-8, 139, 146-9, 152-3, 159-61, 165-6, 231; Garber A475-6; Vasko A307, 308; see Exs. 30A, p. 5; 54A, p. 3; 55A, pp. 3-4; 90A, pp. 1-3 [A1660 at 1661; 1694 at 1695; 1702 at 1704-5; 1802 at 1802-4]).

3. The Company changes management

a. Clairmont's purchase of a controlling interest

About 1958 or 1959, Maurice Clairmont, an experienced manufacturing executive and investor (Clairmont A618-20, 623-4; Vasko A305-6; P.Br. p. 8) began to purchase Lee stock on the open market (Clairmont A613, 615-6, 708). As a small stockholder he always gave his proxy to the existing Garthwaite management and thus came to know Garthwaite, Sr., who occasionally visited him to express his appreciation (*id.*, A616; *cf.* 613). Eventually, when Garthwaite felt threatened by other interests who seemed to be seeking control of the Company, Garthwaite—declining himself to invest further in his Company—encouraged Clairmont to increase his interest (*id.*, A615-8, 622; *cf.* Conway A1140-2, 1313-5). Clairmont did so, as did some of his friends, and by early 1962 Clairmont's group—with about 20-25% of the stock—had "what you would call working control" of the Company (Clairmont A614-5, 949-50;

cf. Conway 1141, 1314; see, *e.g.*, Ex. 62A, p. 2 [A1746 at 1747]). Garthwaite then offered Clairmont representation on Lee's Board of Directors, a position first filled by Cyrus Hoffman before Clairmont himself joined the Board in July 1962 (Clairmont A614, 618; Conway 1141-2, 1314-5; see Ex. 54A, p. 2).

At the time he joined the Board, Clairmont was managing his own and his family's investments (Clairmont A618-9). Although he had no previous experience in tire manufacturing, he had been active and successful in running his family's textile manufacturing business for many years and then in the chief executive position in various manufacturing enterprises (*id.*, A620, 623-4). He was accustomed to making very major investments in all kinds of companies, some of which he eventually took over and rehabilitated when convinced it could be done by better management (*id.*, A620, 710-8; see Exs. 32A, p. 1; 54A, p. 3 [A1664; 1694 at 1695]).*

Prior to making a substantial investment in Lee with Garthwaite, Sr.'s encouragement, Clairmont made as thorough a study as an outsider could of the Company's assets, operations, and prospects (Clairmont A620, 708-10). He surveyed the profitability of the industry and found it good although Lee's own profitability was declining (*id.*, A621). Seeking to explain that, he investigated the plant and equip-

* When it became known at Lee that Clairmont was becoming active in the management, a book began circulating among the Union and lesser management employees criticizing some of Clairmont's prior associations and painting him as some sort of corporate raider (see Hess A141, 150, 258-9; Conway A1142, 1318; *cf.* Clairmont A634, 635, 847-66). This obviously prejudiced the "old-timers" against Clairmont, who—no matter how he tried (see Clairmont A635-7, 677, 846-7; Conway A1329-30; Exs. 30A, p. 5; 32A, p. 1; 101A, p. 1 [A1660 at 1661; 1664; 1889])—was never able to overcome their suspicion and distrust (see, *e.g.*, Hess A95, 140-1, 142, 150, 154, 258-60; Conway A1139-40, 1141, 1147-8, 1332-4, 1335; Vasko A590; Clairmont A635, 671).

However, when the Union confronted Clairmont with this material he denied the charges and suggested that they check the plants involved and see if they "are still operating and if they are making money" (Hess A258-60). The Union did check and found that they were—"there is no doubt about it" (*id.* A260).

ment and found it "in good shape" (*id.*, A622-3, 624-5; see 789-90). He inquired about the labor situation and was assured by Garthwaite that it was "the best * * * in the industry"—never a strike (*id.*, A625). As for the "quality of the product," it was "a good accepted tire" (*ibid.*). Clairmont then concluded that "all the basic tools to make a go of the company were there" and that it was only the absence of effective management (which he had himself observed) which was causing the Company's decline (*id.*, A625-6; see also 621-2, 720, 732-3). He, therefore, committed himself to assume the management and restore the Company to its former profit leadership among the smaller tire companies (*id.*, A626-7, 711, 720-1, 732-3; see Ex. 139A [A1974-2009] *passim*, for past comparative net profits).

b. Clairmont assembles a new management group

Once the decision to assume the management was made, Clairmont began a program of building up an effective management team—"a man for sales, a man for manufacturing, treasurer, and so forth" (Clairmont A627; see Ex. 54A, p. 3 [A1694 at 1695]). Among the new people he brought in were Willard L. Heinrich, an experienced executive and financial man as Executive Vice President; John Garrett, to concentrate on purchasing and reorganization of the Company's branch sales system; Paul Drexler, whom he hired away from Cooper, as cost accountant; and Edward Barkett, with 25 years experience in tire production and formerly associated with both Goodrich and Mansfield tire companies, as Vice President-Manufacturing (*id.*, A627, 628-30; see Ex. 54A, p. 3 [A1694 at 1695]). It was in the course of assembling this team—particularly in his unsuccessful attempts to hire a top level man for sales—that Clairmont first learned the true facts about the Company's miserable production and sales picture (*id.*, A627-8, 709).*

* Clairmont was never able to obtain the top-notch sales manager he sought, although he kept trying (Exs. 54A, pp. 3-4; 90A, p. 3 [A1694 at 1695-6; 1802 at 1804]; Clairmont A664-5; Vasko A590-1).

In persuading Barkett to leave Mansfield and join Lee as Vice President-Manufacturing, Clairmont had apparently projected such an optimistic view of the prospects at Lee that, according to Conway, Barkett was very unhappy when it did not work out the way he had expected (see Conway A1293-4; *cf.* 1276).

While before deciding to participate actively in Lee's management Clairmont had known from the published figures of Lee's declining profit situation and had even been aware of the artificial nature of the 1961 and earlier profit figures (see Clairmont A706-8, 709, 721-6; see Ex. 62A, pp. 9-10 [A1746 at 1754-5]), he had not known of the unrealistic inventory valuation, the highly unfavorable cost-sales relationship, and the uncompetitive productivity of labor at the plant (*id.*, A627-9, 630-2, 707-9, 731-4, 832-4; see Exs. 54A, pp. 3-4; 55A, pp. 3-4; 90A, p. 2 [A1694 at 1695-6; 1702 at 1704-5; 1802 at 1803]).* It was not until he became Chairman in September 1962 that he first learned of the existence of these problems from sales people he tried to persuade to join his management, from the cost accountant and manufacturing vice-president whom he was successful in hiring from competitors, and from his own opportunities as chairman "to sort of open drawers and detect things" (*id.*, A627-32, 633-4, 709-10, 733, 832-4; see 614).

4. The Company seeks to lower its costs

Once fully aware of the true extent of the Company's problems, Clairmont immediately embarked upon a program of reducing costs to the greatest extent possible (see, *e.g.*, Ex. 54A, p. 4 [A1694 at 1696]; Conway A1268, 1272; Clairmont A753, 883, 897-8). This cost reduction took varied forms, including reduction of executive salaries (*ibid.*); elimination of management emoluments like lunch club memberships for managerial personnel at the plant,

* The Strong-Narovec Report, which the Union accepted as accurate, stated that from 1959 to April 30, 1963, the labor costs at the Conshohocken plant had risen from 10 cents to 15 cents per pound of rubber produced (Ex. 40, p. 2 [A1612 at 1614]; Clairmont A641; Hess A163-4). The Report's figures relevant to the Company's claimed need for increased productivity are those relating to pounds of rubber produced per man hour and employment costs, since this data is independent of overhead costs and is, therefore, unaffected by increases and decreases in total production (Ex. 40, p. 2 and Exhibit A thereto, lines 3(a) and 4(d) [A1612 at 1614, 1618]; Clairmont A797-803, 830). The cost of 15 cents per pound of rubber produced at the Conshohocken plant was roughly double the cost of Lee's competitors (Clairmont A629, 630, 647-8; Ex. 55A, p. 3 [A1702 at 1704]).

Garthwaite's limousine, and "all the fringes" (Clairmont A737; Conway A1268-9, 1270, 1272); reducing advertising (Clairmont A737, 898); closing unprofitable branch sales outlets (Ex. 55A, p. 3 [A1702 at 1704]; Clairmont A884-5; *cf.* 895-6); reducing inventories to practical levels (see Ex. 54A, p. 3 [A1694 at 1695]); reducing production to meet anticipated sales (see Ex. 55A, p. 3 [A1702 at 1704]; and cutting labor costs and increasing labor productivity (*id.*, pp. 3-4 [A1704-5]; Clairmont A651-2; *cf.* 628, 630, 883; see Ex. 40 *passim* [A1612-8]). The Union, however, adamantly resisted any changes which would accomplish the latter two essential objectives (Clairmont A634, 638, 652, 883).*

In addition to the need for reduction in costs, particularly the cost of production (see above), an increase in sales was necessary (Clairmont A765, 890; *cf.* 642-6; Gar-

* An example of Clairmont's early concern for the Company's welfare was his effort, begun immediately upon his obtaining representation on the Board, to rid the Company of the obvious disadvantages posed by the lack of co-termination of the Working and Welfare Agreements (see footnote on page 12, above). Considering the 1961 pension funding agreement to have been improvidently made by the old management (compare new management, Clairmont A907-9, 916-8; Exs. 87A, 88A, 118A [A1794, 1795-8, 1904-5], with old management, Ex. 107A, pp. 5-6 [A1897 at 1901-2]) and rightly viewing non-co-termination as a significant disadvantage to the Company in case of future disagreement with the Union over actions necessary to re-establish the Company's profitability (compare Clairmont A907-9 with Union, Vasko, A324-5, 599-600; Oldham Tr. 1199-200), Clairmont took advantage of the necessity for Board approval of the funding provision to try to obtain co-termination or at least a limitation of the Company's pension and other liabilities under the Welfare Agreement in the event of future conflict with the Union (Clairmont A907-9, 916-8; Oldham Tr. 1158-9, 1193-200).

There was no doubt that this would have been a real benefit to the Company and is now the general practice (see Conway A1317-8; Vasko A600-3). In the face of the Union's refusal to give up its obvious advantage, Clairmont—thinking it best to show some flexibility—settled in December for a small clarifying amendment, abandoned his other requests, and agreed to make the funding payments (Clairmont A909; Oldham Tr. 1193-4; Ex. 37 [A1607-9]; Ex. 120A). Thereafter, the required substantial payments to the pension fund were made for 1962 and the two succeeding years (Oldham Tr. 1185; Vasko A592; see Ex. 44A; Exs. 54A, pp. 4, 9; 107A, pp. 5-6; 132A, p. 2 [A1694 at 1696, 1701; 1897 at 1901-2; 1948 at 1949]).

ber A444-5, 520; see Ex. 40 [A1612-8] *passim*). While this was, as Clairmont described it, a "chicken and egg situation" in which increased sales depended upon a reduction in production cost and a reduction in production cost depended, at least to some extent, upon increased sales (Clairmont A642, 765, 792-4; Garber A521-2), Clairmont nevertheless did his best to improve the sales situation (Clairmont A664-6; see Exs. 54A, p. 3; 55A, p. 5 [A1694 at 1695; 1702 at 1704-6]).

He initiated a program to reorganize and improve the Company's sales and distribution outlets (Clairmont A884-5; *cf.* 895-6; Exs. 54A, p. 3; 55A, pp. 3-5; 40, p. 2 [A1694 at 1695; 1702 at 1704-6; 1612 at 1614]). He continued his efforts to find a new sales and marketing executive of the caliber of his previous additions to his management group (Clairmont A664-5; see 630; Exs. 54A, pp. 3-4; 90A, p. 3 [A1694 at 1695-6; 1802 at 1804]). He obtained a large new account—the Pep Boys—a private brand operation, which permitted him to utilize employees whose lay-off was imminent (Clairmont A665, 792-3). In addition, he tried to obtain other large distribution customers like Montgomery Ward and similar chains which could be counted on to utilize a large amount of the Company's productive capacity (Clairmont A666-9; see Exs. 90A, pp. 3-4; 55A, pp. 3-4; 40, p. 2 [A1802 at 1804-5; 1702 at 1704-5; 1612 at 1614]).*

5. Company efforts to enlist Union cooperation

As early as October 1962, the Company sought to acquaint the Union with the seriousness of its situation and to enlist Union aid in improving it (see Ex. 30A [A1660-1]; Clairmont 832, 835; Conway A1142, 1326-30; Hess A102-7, 146-7, 149-50; Vasko A304-5, 326-9, 330-1, 589-91; Oldham

* The fact that these efforts were largely unsuccessful because of the Union's refusal to cooperate in reducing the cost of production by increasing productivity (see Clairmont A792-4; Ex. 55A, p. 4 [A1702 at 1705]) emphasizes the Union's responsibility for the failure rather than negating the sincerity of the effort (see Clairmont A734).

Tr. 1201). A series of meetings was held that fall, the first two attended by URW International representatives, at which the Company described its situation and made specific proposals for Union relief with respect to both the Working and Welfare Agreements (see Exs. 30A-32A [A1660-5] *passim;* Clairmont A832, 835; Hess A101-18, 150-1, 155-9). To all the Company's pleas for cooperation in survival, both Local 227 and the URW International turned deaf ears, refusing any cooperation either with respect to the cost of production or reduction in pension costs (Exs. 30A-32A [A1660-5] *passim*).

Clairmont himself attended the first and third meetings (the latter at the express request of Local 227) where he straightforwardly described his holdings and his past associations, his objectives with respect to the pension fund, his "open door" policy toward the Union, and—particularly with respect to co-termination of the Working and Welfare Agreements—his determination to protect the Company's interests (see Exs. 30A, pp. 1-2, 3, 5; 32A, p. 1 [A1660 at 1660, 1660-1, 1660-2, 1661; 1664]). At each meeting, the Union showed no appreciation or even understanding of the Company's difficulties or needs, contenting itself generally with complaints or inquiries about petty local matters (see Exs. 30A, pp. 4-5; 31A *passim;* 32A, pp. 1-2 [A1660 at 1660-3 to 1661; 1662-3; 1664-5]).*

On April 16, 1963, shortly before notices would have to be given if either party wished to prevent the continuation of the old Working Agreement without change (see Ex. 35, p. 64 [A1549 at 1576], §18.01; Vasko A593-4), Clairmont

* Plaintiffs claim that until the trial Clairmont had never taken the position that the "labor agreements" and the way they were applied were responsible in any way for the Company's problems or were in need of change to improve the Company's production cost (see P.Br. pp. 59-61). For evidence to the precise contrary see Exs. 30A-32A; 90A, pp. 3, 4-5, 6, 10, 11, 12; 99A [A1660-5; 1802 at 1804, 1805-6, 1807, 1811, 1812, 1813; 1881-5] and all future negotiation session minutes, *viz.*, in chronological order, Exs. 127A-130A, 134A, 131A-133A, 100A-102A, 137A, 35A-43A [A1918-44; 1956-9; 1945-55; 1886-94; 1968-73; 1666-87]; see also Ex. 55A, p. 4, col. 1 [A1702 at 1705, col. 1].

made another effort to obtain Union understanding and cooperation (see Ex. 90A [A1802-13]; Clairmont A638-40). While the burden of the meeting was the propriety of a Clairmont proposal to abrogate or at least substantially reduce the Company's heavy past service pension liability in order to increase the possibility of acquiring substantial new partner-customers (Ex. 90A, pp. 4, 6-7, 8-9, 11, 12 [A1802 at 1805, 1807-8, 1809-10, 1812, 1813]; Clairmont A666-9), a large part of the meeting was devoted to the problems of production cost, its relationship to sales, and the necessity for changes in the plant and the Union contract in order to achieve a competitive cost of production (see *e.g.*, *id.*, pp. 2, 3, 5, 8, 9, 10, 11 [A1803, 1804, 1806, 1809, 1810, 1811, 1812]).

The meeting concluded with an agreement to make a joint study of "how much would costs have to be reduced in order to put you in a competitive position that you are talking about" (*id.*, pp. 9-10, 12 [A1810-11, 1819]; Clairmont A640). The study was made by a Mr. Barbu who was suggested by, and had done previous work for, the URW International (Vasko A308-9; Clairmont A639-40; *cf.* Ex. 90A [A1802-13]). The results of the study were circulated in a report dated June 14, 1963, known as either the Barbu or the Strong-Narovec Report (Ex. 40 [A1612-8]; PTO, A1472-3, par. 7; Conway A1333; Garber A444). The Report confirmed in all respects the Company's claims of unacceptably high production cost, unacceptably low (and decreasing) production per man hour, and continuing losses at an ever increasing rate (see Ex. 40 [A1612-8] *passim*; Clairmont A641-2, 646-8, 795-801, 802-3, 827-31; *cf.* Garber A444-7, 515-6, 522-3; Exs. 99A, p. 2; 128A, p. 1 [A1881 at 1882; 1928]).*

* Hess, Local 227's president, did not believe the Company was in trouble and did not believe the facts shown in the Strong-Narovec Report because he, erroneously, thought it had been made by "the same firm that took the surveys at Atlas Plywood" (see Hess A162, 143, 144-5).

Conway testified that he also gave no credence to the Barbu Report, assuming it to be "a one-sided statement" because he, too, erroneously, believed Barbu had been chosen by Clairmont to make it (Conway A1335; *cf.* 1332-4; A1389).

6. Negotiations for a new Working Agreement

Having given repeated notice that it needed and would seek changes in the Working Agreement terminable on June 30, 1963 (see Exs. 30A-32A; 90A [A1660-5, 1802-13] and pages 20-21, above), the Company, on April 18, 1963, gave the Union formal written notice of its desire to renegotiate that Agreement and, on April 29, the Union sent the Company a similar notice (PTO, A1473, pars. 8, 9; Exs. 38, 39 [A1610, 1611]).* Negotiations began on May 29 (PTO, A1473-4, par. 10). Clairmont opened them with a plea to the Union to show good judgment, intelligent self-interest, and "a business attitude" (Ex. 99A, p. 1 [A1881]). The Union's initial response was to claim that the Company should be able to "go along with the pattern of the other Company's [*sic*]" and that the Company could make a profit "if [it] wanted to" (*id.*, pp. 1-2 [A1881-2]; see Hess A165-6).**

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* Plaintiffs and their witnesses seek to use the unusualness of such a Company notice as evidence of some sinister intention on Clairmont's part supporting their claim that he had made up his mind permanently to discontinue operations at the plant (see P.Br. p. 14; Hess A121-2; Vasko A310-3, 593-8; Conway A1188-92, 1303-4). That is, of course, arrant nonsense. In the first place, federal law requires such a notice if one intends to seek changes in a collective bargaining agreement (National Labor Relations Act, Section 8(d), 29 U.S.C. §158 (d)). Secondly, if no such notice were sent the Company ran the risk of being stuck for another year with the unsatisfactory terms of the current Working Agreement—a situation the Union eventually sought to achieve (compare Ex. 35, p. 64 [A1549 at 1576], §18.01 with Hess A123-5; Garber A517-9; Exs. 128A, 100A [A1928-34, 1886-8]). Whatever might be the delight of a company in ordinary circumstances if it could continue, without escalation, the terms of an existing contract (see Vasko A594-5), it has no relevance to the proper procedures to be taken by this Company where continuing under the existing contract was already clearly unacceptable (see A1190, 1421; Clairmont A652, 663-4; Exs. 30A-32A, 99A, 55A, pp. 3-4 [A1660-5, 1881-5, 1702 at 1704-5]).

** Prior to these negotiations, the Company had, on February 11, 1963, approved the expenditure of approximately $200,000 to make operational a new twin tread tuber, the principal part of which had been ordered, but left uncompleted, under the Garthwaite management (see Ex. 125A [A1916]; Hess A994-5; Tarbutton Tr. 1708-12; Heinrich A1007-16, 1019, 1027; Conway A1353; see text and foot-

(footnote continued on next page)

Negotiations continued on May 31, June 7, 10, 11, 14, 19, 21, 24, 26, 27 and 28 (PTO, A1473-4, pars. 10, 12; see Exs. 99A, 127A-135A, 100A [A1881-5, 1918-64, 1886-8]). On or about June 9, the Union took a formal strike vote and several days later informed the Company that the Union had authorized a strike at the discretion of Local 227's Executive Board (PTO, A1474, par. 11). Beginning with the June 19 meeting, the parties were assisted by a federal mediator who attended every meeting through February 3, 1964 (*id.* at par. 12).

Before beginning the negotiations, Conway had collected and Company officials had reviewed the URW contracts with competing rubber companies in preparation for making its proposals in the forthcoming negotiations (Clairmont A651, 823; *cf.* 741; Conway A1336-8). Based upon that review, the Company formulated its proposed revisions to the Working Agreement, the most important of which included (1) a 25% wage cut, (2) a tightening of all rates, both hourly and incentive, through a job evaluation performed by a Company-appointed independent industrial engineer, (3) designation of certain "key jobs" which would be exempt from the application of seniority on layoff or recall, (4) limitation of recall rights from an indefinite period of 6 months after layoff, and (5) a roll back of "1961 cost items" in the working and SUB Agreements (Exs. 98A, 99A [A1845-80, 1881-5]; Clairmont A651; Conway A1338).*

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note on pages 8-9, above). The Union, on the other hand, had rejected out-of-hand a formal request from the Company to permit the recall of tire builders out of seniority in order to make possible an increase in production which would not only avoid additional lay-offs but also permit the employment of a few additional people (see Ex. 91A [A1814-5]; Hess A284-6; *cf.* 261-5; Garber A528-31). Hess testified that in his opinion Barkett, the Vice President-Manufacturing who wrote the letter, was "lying" (Hess A286-7).

* With the possible exception of the roll back of 1961 cost items, none of the Company's major proposals was unprecedented (Clairmont A656-8): (1) a substantial wage reduction had been given earlier that year by another URW local to Dunlop, a major rubber company (Clairmont A663; *cf.* 931; Exs. 13A, 93A, p. 6 [A1643-9,

(footnote continued on next page)

The job evaluation (coupled with th wage cut) was the most critical proposal in terms of restoring the Company's competitive position (Clairmont A649, 651, 652). Its main purpose, and its undoubted result, was to bring the Company's incentive rates into line with competition—rates which (as described by a former URW International representative) had under the old management grown "like Topsy," without rhyme or reason, and had become so "loose" as to be largely responsible for the Company's constantly declining productivity per man hour (*cf.* Garber A470; see Clairmont A649, 651, 733-4, 834-5; Vasko A314-5; Ex. 40, pp. 2-3, and exhibit A thereto [A1612 at 1614-5, 1618]). The wage cut was designed as a "spur to production" prior to the application of tighter rates pursuant to the job evaluation (Clairmont A653, 659, 927-8, 930-1; *cf.* Garber A455, 477-8, 548-51), and the Company's later productivity or profit-sharing proposals were designed to provide a way for the employees to earn their past wage, once the rate revision, which guaranteed the Company the added production it required, became effective (*ibid.;* Ex. 93A [A1821-40] *passim;* Clairmont A661-3, 927-8).

The Union also made its own proposals, seeking, as it always had, the wage increases recently established in negotiations with the Big Four (Hess A90, 93-4, 165-6; Ex. 127A, p. 5 [A1918 at 1922]; Conway A1143; see page 13, above). Like the Company, the Union submitted a substantial list of proposals, even asking for 50% of the plant vending machine profits (see Ex. 127A [A1918-27] *passim*).

The early negotiations were punctuated by the receipt of the Strong-Narovec Report (see page 21, above). While

1821 at 1827]; *cf.* Hess A179-82; see also Garber A457-9, 534-6); (2) the job evaluation proposal had, in essence, come from the Cooper and Mohawk agreements (Clairmont A749, 751-2; Exs. 127A, 133A [A1918-27, 1952-5]); (3) key jobs had been proposed by the Company, unsuccessfully, in past negotiations (Conway A1251) and, in any event, were not unusual in the industry at that time and since (Garber A497, 510-1); and (4) the limitation of recall rights was then standard practice in industries other than the manufacture of tires (Ex. 127A [A1918-27]; *cf.* Vasko Tr. 579-80).

the Company hoped the Report's confirmation of the accuracy of the Company's productivity and loss contentions would have a beneficial effect on the outcome of the negotiations, it did not because the Local 227 negotiators did not understand it and the URW International negotiators chose to interpret it as showing lack of sales rather than higher production costs as the primary villain (Clairmont A646-50; Hess A163; Garber A412, 444-7, 520-3; see pages 18-19, above).*

As the negotiations proceeded prior to the Working Agreement's scheduled June 30 expiration, the Company modified some of its major and many of its minor proposals and accepted some Union non-cost proposals: (1) on June 11, the Company modified its proposed limitation on length of recall rights and agreed to some Union proposals (Ex. 129A [A1935-42]); (2) on June 19, it further relaxed its recall rights proposal from six months to one year, revised its previously unilateral job evaluation program to become bilateral and subject to final arbitration before a jointly selected independent industrial engineer,** and dropped portions of its proposal regarding a roll-back of added 1961 SUB cost items (Ex. 134A [A1956-9]; Clairmont A659-60, 740-1; Garber A396-7, 443-4, 483-8); (3) on June 21, the Company dropped more of its 1961 roll-back proposal, agreed to several more Union proposals, and softened its position on a proposed termination date and foremen returning to the bargaining unit (Ex. 131A [A1945-7]); (4) on June 26, the Company dropped and substantially revised a number of its non-cost proposals, further limited its job evaluation program by reference to the Cooper and Mohawk agreements, and again modified its 1961 roll-back proposal (Ex. 133A [A1952-5]; Clairmont A749, 751-2); (5) on June 27, the Company modified its "key jobs" exemption proposal by offering to eliminate all but three jobs when production reached a specified higher level (Ex. 135A [A1960-4]); and (6) on June 28, the

* As previously noted, both Hess and Conway discounted it anyway in the mistaken belief that it was a Clairmont set-up (see footnote on page 21, above).

** The Union refused even this proposal (see Hess A168-9).

Company withdrew several additional proposals (Ex. 100A [A1886-8]).

During the same period, despite the Company's insistence upon its documented need for substantial cost reductions to become competitive, the Union adamantly refused to accede to any of the Company's major proposals (Clairmont A663-4, 741; Garber A487-9, 514, 558; *cf.* Hess A123-4, 170-1; see, *e.g.*, Exs. 129A, 130A, 100A [A1935-44, 1886-8]). Its continuing lack of realism is evidenced by its claim that its "informal" willingness to forgo the Big Four wage increase of 9¢/hour for 1963 and an additional 7¢/hour for 1964 and to work for another year under the present unsatisfactory contract constituted "major concessions" which should satisfy the Company's needs (see, *e.g.*, Exs. 101A, 134A [A1889-91, 1956-9]; see P.Br. p. 17; Hess A135-6, 170; *cf.* Clairmont A652, 663-4; and Company comments in the cited minutes).

As the June 30 expiration date approached, the Company made successive attempts to get Union agreement to extend the terms of the existing Working Agreement while negotiations continued, subject to termination by either party upon giving specified notice in order to prevent the spoilage of goods-in-process (Clairmont A673; PTO, A1475, par. 13; Hess A173-5; Garber A540-2; Exs. 92A, 100A, 103A, 137A [A1816-20, 1886-8, 1895-6, 1968-70]). However, the Union would agree only to work on a day-to-day basis and refused to give the notice which the Company deemed necessary to protect the legitimate interests of its remaining customers (PTO, A1475, par. 13). Notwithstanding this refusal, on June 29, the Company informed the Union that it would be open on July 1 and would continue to apply the terms of the then expired Working Agreement until it gave notice to the contrary (*ibid.*; see Ex. 41 [A1619]). The Union agreed to work on a day-to-day basis under these conditions but reserved its right to call a strike at any time (PTO, A1475, par. 14; see Ex. 42 [A1620]).

In view of the real possibility of a strike, the Company, prior to the contract expiration date, began moving tire

molds, raw materials, and finished products out of the plant, and hesitated to put new stock into preparation in order not to be caught unprepared if the Union walked out (Clairmont A673-4, 755-6; *cf.* Hess A176-8, 187-9, 267-8, 290, 292; A1097; Exs. 134A, 132A [A1956-9, 1948-51]). As a consequence, production decreased somewhat in the last days of June and in early July and a number of Union employees may well have been assigned to general plant maintenance rather than production jobs (Clairmont A754-6, *cf.* Hess A266, 289-92).*

While the Union was continuing to work on this day-to-day basis, the parties continued to negotiate and met on July 1, 3, 5, 11 and 12 (PTO, A1475-6, par. 15; Exs. 136A, 101A, 102A, 137A [A1965-7, 1889-94, 1968-70]). Clairmont attended the July 3 negotiating session for the first time since they began on May 29 in order to review the Company's situation and negotiation status and to offer a new proposal designed to break the deadlock which seemed to have developed by giving the Company "the economic relief it needs" while at the same time giving the employees "a chance to regain the requested wage reduction so that they may eventually wind up with the same take home pay" (Ex. 93A [A1821-40]; see Ex. 101A [A1889-91]; Clairmont A661-3, 741, 812-3, 927-8; Garber A547). A choice between a productivity sharing and a profit sharing plan was proposed, either of which would have permitted employees to recoup the proposed wage cut by increasing their productivity (Clairmont A661-3, 741, 812-3; Garber A547; Hess A183-6; Conway A1346-8). In fact, one of the Union representatives at the meeting acknowledged that under the proposal the employees could recoup all but approximately $100 of the anticipated wage cut (Ex. 101A, p. 2 [A1889 at 1890]). However, the Union was willing to accept this

* Customers' molds had been shipped out pursuant to their orders to do so and tires had been removed from the plant to enable the Company to fill its customers' orders (Clairmont A674; Exs. 13A, 132A, p. 1 [A1643-9, 1948]). In fact, after the Working Agreement had expired, on July 1, the Company unsuccessfully proposed an agreement to the Union under which these molds and tires could be returned to the plant and, possibly, production increased (Ex. 137A [A1968-70]).

proposal only if it were not tied to any wage reduction (Clairmont A663, 741; Hess A183-6; *cf.* Garber A514, 547; Conway A1348).

Despite the Union's rejection of Clairmont's proposal, the Company continued to modify and decrease its earlier proposals: (1) the 25% wage cut was reduced to 20% (Exs. 137A, 35A [A1968-70, 1666]; Clairmont A653, 741, 932; Hess A167;* (2) the number of "key jobs" was further reduced, in addition to offering that all key jobs, except tire builder, would be eliminated as soon as production reached a certain level (Ex. 137 [A1968-70]; Garber A553; *cf.* Clairmont A655-6); and (3) the limitation of recall rights was extended to two years provided separation payments under the SUB Agreement would be limited to the fund established for that purpose (Ex. 137A [A1968-70]; see Garber A539-40).**

While the Company was thus modifying its proposals, the Union did little more than offer to extend the old Working Agreement for two more years and make some informal and minor movement (Clairmont A652, 663-4; Hess A126-7, 190; Garber A518; see Exs. 102A, 137A [A1892-4, 1968-70]). The Union's only truly new proposal was an offer to accept five per cent of its wages in the form of stock (Clairmont A936-7; Hess A255-6, 281-3; Garber A543-7; Ex. 102A [A1892-4]), which the Company rejected because it would not actually effect a reduction in labor costs (Clairmont A936-7; Garber A544-5, 547; Hess A256-7; Ex. 137A [A1968-70]). In all other respects the Union continued to refuse the Company any of the major relief it sought, particularly any form of a wage cut (Clairmont A663-4, 741; Hess A191-2, 200-1; Garber A489, 547).

* The plaintiffs' brief cites this as the only example of the Company's "minimal changes in its demands" (P.Br. p. 17).

** Plaintiffs contend that the Company sought to limit recall rights for the purpose of avoiding liability for the Special Distribution (P. Br. p. 16). However, the negotiation minutes establish that the only purpose in seeking to limit these rights was to limit the Company's separation payment obligations under the SUB Agreement (see Exs. 39A, pp. 2-3; 137A; 37A [A1675 at 1676-7; 1968-70; 1668-71]; Garber A398, 504-6).

Eventually, considering the negotiations deadlocked on vital and fundamental issues, the Company decided that it could no longer accept the continually increasing losses caused, in large part, by the continued application of the terms of the now expired Working Agreement (Clairmont A674-6; Ex. 43 [A1621-2]; see Conway A1198-200, 1204-6). Therefore, on July 16, 1963, the Company formally notified Local 227 that it would no longer apply the terms of the old Working Agreement and that, as of July 18, it would institute certain changes in wages, benefits, and working conditions deemed essential to the Company's economic survival (PTO, A1476-7, par. 16; see Exs. 43, 44 [A1621, 1622-3]). The new work rules contained most of the major Company proposals "as amended to date during negotiations," but the Company expressed its willingness to continue to negotiate all issues, including those proposals embodied in the new work rules, to make retroactive to July 18, 1963 any changes eventually negotiated, and to continue to apply, until further notice, all other previous terms and conditions of employment not inconsistent with the new rules (see Exs. 43, 44, par. 9 [A1621, 1622 at 1623]).

The Union thereupon advised the Company that the new work rules were unacceptable, that the day-to-day agreement was cancelled, and that it was going on strike (PTO, A1477, par. 16). It began picketing the plant that afternoon and continued to do so until some time in 1965 (*id.* at A1477-8, par. 18).*

* The Union denominated its action a "strike" and it was clearly considered such by all parties, at least until the Company had notified the employees on December 14, 1964, that their employment was terminated (see, *e.g.*, A33 at 42, par. 8; Exs. 50, 51 [A1629-31]; *cf.* Ex. 26A [A1655]). At various times since then, the Union and plaintiffs have contended that it was a "lockout" rather than a "strike," and Judge Knapp indicated during and at the conclusion of the trial that he would so find, although he did not consider it relevant (A1094, 1115, 1414).

Insofar as such a finding is based upon Clairmont's acknowledgement that by July 16 the Company had concluded that the Union could not be brought to a realistic frame of mind without the economic pressure of unilaterally changed work rules which might well precipitate a

(footnote continued on next page)

7. The Union's complaint to the NLRB

On July 8, while both parties were still working under the terms of the old Working Agreement, the Union filed a refusal to bargain charge with the National Labor Relations Board ("NLRB") alleging that the Company was not bargaining in good faith and had made no explanations, clarification, or modification with respect to any of its proposals to the Union (see Ex. 94A [A1841]; *cf.* Exs. 129A, 134A, 135A, 102A [A1935-42, 1956-64, 1892-4]; Hess A197-8; see Garber A752-3). On August 20, a month after the strike began, George Vasko, plaintiffs' Assistant General Counsel, amended the charge to include allegations that the Company had failed to bargain in good faith by maintaining its position that it needed substantial changes in the Working Agreement and by unilaterally altering the terms and conditions of employment offered to its Union employees (see Ex. 95A [A1841-1]; *cf.* Vasko A604-5; see Garber A572-5).

The NLRB thereafter investigated the Union's charge and amended charge and sought and obtained, by interviews and documents, the information and material which the Union and the URW International believed supported their allegations (see Garber A572-5; Vasko A604-5; *cf.* Hess A199). On October 4, 1963, almost three months after the strike began, the appropriate Regional Director of the NLRB refused to issue a complaint, stating in detail the factual reasons for his decision (Ex. 17A [A1650-1]; *cf.* Hess A211-2). The URW International's administrative

strike, defendant has no objection to such terminology (see Clairmont A674-5). Despite the importance now given by plaintiffs to the "lockout" finding (see P.Br. pp. 17-19, 56, 65-66), plaintiffs' witnesses at the trial agreed that—like a "strike"—a "lockout" is a recognized negotiating tactic which the Company had every right to employ in the circumstances and that offering work on changed conditions was no worse than actually locking the plant (Garber A567-9; *cf.* 580-1; Vasko A316-20). As a matter of fact, it is considerably better; the employees were given an opportunity to try out the Company's requested terms which, if taken, might well have led to an entirely different result.

appeal from this decision was rejected for the same reasons (Ex. 18A [A1652]).*

At no time thereafter did either Local 227 or the URW International file with the NLRB any charge against the Company alleging any illegality, impropriety, or "charade" with respect to any of the Company's negotiations or actions concerning the Conshohocken plant (Hess A246-7).

8. Company efforts to stay in business

After the strike and picketing began on July 16, the Company met with the Union on numerous occasions in unsuccessful efforts to agree upon acceptable terms of a new Working Agreement which would end the strike and permit the plant to reopen (PTO, A1477-8, 1480, pars. 18, 22; Clairmont A676; Hess A128, 205, 208, 215-6; see, *e.g.*, Exs. 37A, 38A, 39A, 40A, 41A [A1668-82]). These meetings took place periodically, usually with the assistance of a federal mediator, until some time in early 1964 when the

* At the trial, plaintiffs contended vigorously, through their counsel and Vasko, now General Counsel to the URW International, that the NLRB refusal to issue a complaint was of no significance or relevance since it was an entirely discretionary matter rarely, if ever, used in the case of parties with a long bargaining history (see Tr. 284A-90A; Vasko Tr. 536-47, 931-8).

In response, defendant filed a memorandum of law with the trial court demonstrating that the issuance of a complaint is mandatory under the NLRA in any case where the Regional Director, after investigation, finds that "the Charge appears to have merit" and the Regional Director finds "that formal proceedings in respect thereto should be instituted" and that complaints or charges similar to those filed by the Union herein are regularly issued even where the parties have a long bargaining history, particularly where there has been a recent change of management [see Tr. 286A-7A; A607; NLRA, 29 U.S.C. 160(b); NLRB Statements of Procedure and Rules and Regulations, 29 C.F.R. §§101.2, 4, 5, 8; §101.15; Annual Report of the NLRB, 1964, pp. 11-12; Speech by NLRB Chairman on May 27, 1964, 56 LRRM 117, 119 (1964); see also as examples of complaints issued *Houston Sheet Metal Contractors Assn.*, 147 NLRB 774, 775 (1964) (bargaining history since 1951 and 1958); *Mobil Oil Co.*, 147 NLRB 337, 339 (1964) (same since 1944); *The Celotex Corporation*, 146 NLRB 48, 51 (1964) (same since 1941); *American Stores Packing Co.*, 142 NLRB 711, 714 (1963) (same since 1946; lockout after years of harmonious bargaining with "no strikes of work stoppages or threats of the same")].

mediator suggested that no more meetings be held until one or the other of the parties was prepared to make a significant change in its position (see Hess A221-2, 218; PTO, A1474, par. 12).

Throughout that period, the Union never agreed to any of the basic proposals the Company considered necessary to put Lee back into a competitive position (Clairmont A676; Exs. 38A, 40A [A1672-4, 1678-80]). Although during these negotiations the Company repeatedly stated its position that it would not and could not afford to reopen the plant without a wage cut, the Union adamantly stated that it would never accept even a "one cent" decrease (Clairmont A955; Hess A206-8, 217, 220; Exs. 37A, pp. 3-4; 38A, p. 3; 39A, p. 1; 40A, p. 3 [A1668 at 1670-1; 1672 at 1674; 1675; 1678 at 1680]). While the Union talked about making a productivity sharing proposal in which the Company expressed some interest, no formal proposal ever materialized (Exs. 37A; 38A; 39A, p. 2; 40A; 41A *passim* [A1668-74; 1675 at 1676; 1678-82]).

Meanwhile, since the strike had forced a halt to tire production at the plant (which the Union was enforcing by picketing designed to prevent entry by any persons suspected of doing the Union's work (see Hess A203, 300)), the Company through its wholly owned subsidiary, Lee Tire Centers, Inc., contracted in August 1963 with the Mohawk Rubber Company and later with the United States Rubber Company for those companies to manufacture Lee tires from Lee molds furnished by the Company for sale by the Company to its customers through its regular distribution outlets (PTO, A1479-80, par. 21; Exs. 15A, 16A; Ex. 55A, p. 4 [A1702 at 1705]). The Union, in addition to exerting direct pressure on Mohawk and U.S. Rubber to stop manufacturing for Lee, sought to undermine these attempts to salvage the Company's few customers by instituting a nation-wide boycott of Lee tires (Hess A209-11, 239-41; *cf.* 205; Exs. 26A, 37A, p. 1 [A1655, 1668]). The manufacture of Lee tires outside of Conshohocken confirmed the Company's position that its cost of production

was grossly uncompetitive, since, after paying a profit to Mohawk or U.S. Rubber, Lee was taking less of a loss on the tires than if it had manufactured them itself (Clairmont A734-6).

Throughout the strike the Company continued to employ at the plant "the whole organization except labor," sixty or seventy people in various capacities, including tire compounders, chemical engineers, administrative personnel, and maintenance men so as to be prepared to start operations in case the strike were concluded (Clairmont A675; PTO, A1479, par. 20; A1097). Also throughout this period, the Union continued to disrupt the Company's remaining operations by maintaining constant picketing, often involving threats and acts of physical violence which ultimately required the Company to obtain a restraining order from the Pennsylvania state courts against such activity (Hess A202-5; *cf.* Clairmont A681; A1091).

9. Termination of the Welfare Agreement

On May 1, 1964, nine months after the strike began, the Company gave the requisite notice to reopen the Welfare Agreement pursuant to its terms (Ex. 45 [A1626-7]; PTO, A1480, par. 22; see Ex. 36, p. 25 [A1581 at 1605], par. 7; see pages 4, 11-12, above). Thereafter, it sought to achieve the co-termination of the Working and Welfare Agreements and various other changes it had unsuccessfully sought from the Union between June and December 1962 and which the Union had then opposed, principally upon the ground that such negotiations were inappropriate at that time (compare footnote on page 18, above, with Ex. 13A [A1643-9]; Oldham Tr. 1194-9).

Five negotiating sessions followed (PTO, A1480, par. 23). During those negotiations, the Union agreed to accept the Company's Welfare Agreement proposals provided the expired Working Agreement were extended for an additional two years (Hess A233-4). When the Company rejected this proposal, the Union took the position

that it would not negotiate about the Welfare Agreement until the Company and the Union had agreed upon the terms of a new Working Agreement (Clairmont A678; Hess A236-7).* When it was apparent that no further progress was going to be made, the Company exercised its right to give notice of the termination of that Agreement sixty days thereafter (Ex. 48 [A1628]; PTO, A1481, par. 24). Whereupon, after an additional six fruitless negotiating sessions, the Welfare Agreement terminated on September 8, 1964 (*id.* pars. 25, 26; *cf.* Ex. 49).

10. The Company ceases operations at Conshohocken

Hoping that the elimination of the Welfare Agreement might "jolt" the Union out of its intransigent negotiating stance, the Company continued to negotiate with the Union (Clairmont A678-9; Hess A235-6, 296; PTO, A1481, pars. 27, 29). However, the Union's position remained adamant and, when the Company informed the Union that it was investigating the possibility of hiring replacements for the strikers, the Union responded by increasing the hostility of its picketing and announced that it would do anything necessary, legal or illegal, to prevent the Company from doing so (Clairmont A679-81; Hess A203, 300-1).

On November 25, at a negotiating session with the Union, attended by the federal mediator, the Company's negotiators told the Union that its Board of Directors would meet on November 30 to consider the Company's financial statements for the fiscal year ended October 31, 1964, and probably to consider the future of the Conshohocken plant (PTO, A1482, par. 29; Tr. 367). The parties agreed to meet again on December 10 for a report on that meeting (*ibid.*). The Board met on November 30 at the Company's offices in New York and, after a discussion of the seemingly hopeless strike situation at Con-

* During these negotiations, the Union suggested that, while it might have given the relief requested to the former management, it would not give it to Clairmont (Hess A237-8).

shohocken, adopted the following resolution (*id.* par. 30; see Clairmont A681-2; Ex. 56A, p. 3 [A1713 at 1715]):

> "RESOLVED that all manufacturing operations at the Conshohocken, Pennsylvania plant of this Corporation be discontinued permanently and the Corporation, accordingly withdraw from tire manufacturing activities following review and discussion thereof with Local 227."

When the Company notified the Union of the closure decision at the scheduled meeting on December 10, the Union stated that it was still on strike and would continue to picket the plant (PTO, A1482-3, par. 31; Hess A245). On December 14, the Company by letter notified each employee of its decision to discontinue permanently all operations at Conshohocken and the reasons therefor (Exs. 50, 51 [A1629-31]; PTO, A1483, par. 32). In January 1965, the Union filed a grievance demanding a Special Distribution on Discontinuance of Operations under the Welfare Agreement, which it said had "happened" on "12-14-64" (Ex. 97A, p. 2 [A1842 at 1843]). The Company also received forms from individual Union employees stating their election of such a distribution (PTO, A1483-4, par. 33). The Company rejected these claims on the ground that it had no obligation to make such payments (*id.* at A1484, pars. 34, 35).

11. The lease and sale of the plant to Goodyear

Following the decision to "withdraw from tire manufacturing activities" (see *id.* at A1482, par. 30), the Company sought some disposition of the Conshohocken plant (Clairmont A683). Fortunately, the Anti-Trust Division of the United States Department of Justice in early 1965 approved the sale of Seiberling, another faltering tire company, to Firestone, a member of the Big Four, and Clairmont seized upon this precedent as a means to interest Goodyear in the Conshohocken plant (*id.* A683-5). Several months later, on March 1, 1965, Goodyear entered into an

option agreement with Lee looking toward the lease and possible later purchase of the Conshohocken plant by Goodyear if government approval could be obtained (*id.*, A684-96; see Vasko A323; Hess A248, 250).

On April 21, Goodyear exercised the option and in May began to ready the plant for the resumption of tire manufacturing (Hess A249-50). Hess and "quite a group" of the old Lee employees went back to work there—without a Union contract (*id.*, A251-2; Clairmont A696-7). Goodyear had previously told the URW International that it was "unwilling to assume the agreements that had expired with Lee Tire" (Vasko A323), and it was careful not to set any rates at the plant until "they got their industrial engineers in to reevaluate each job" and had "established job loads and incentives and rates exactly as they had in other plants" (Hess A288; see 131-2; Clairmont A696-7). Only then did Goodyear agree to buy the plant (Clairmont A697).*

* Approximately the same thing happened when the Aeroquip Company bought Lee's Republic Division in Youngstown, Ohio, which manufactured rubber hosing, belting, and other similar products under Working and Welfare Agreements between the Company and URW Local 102 practically identical to those at Conshohocken, including termination provisions and dates (see generally PTO, A1461-8, pars. 1-4, 6-8, 10-12, 14-15; Exs. 1, 1A *passim*). When after generally similar contract proposals, new work rules, and a strike by Local 102, the Aeroquip Company arranged to buy the Republic Division, Aeroquip insisted upon and got from Local 102 a Working Agreement which contained practically all the provisions which Clairmont had sought from Local 102 in the negotiations and which Local 102 had refused (Clairmont A699-701, 969-72; Vasko Tr. 922-3; Somo Tr. 964-77, 990-5, 1008, 1013-4, 1018-24, 1027-9, 1113-20; see PTO, A1464, pars. 6-7; Exs. 2-6, 111A-113A [A1513-48, 1903-1 to 1903-44]; Hess A237-8, 287-8).

The sale arrangement also specifically provided that the sale would not constitute a complete and permanent discontinuance of operations of the Republic plant within the meaning of the Special Distribution section of the Welfare Agreement (Ex. 3 [A1541]; Vasko Tr. 922; Clairmont A944-5). In the Conshohocken Welfare Agreement negotiations, Hess proposed a clause which, by designating a sale as a complete and permanent discontinuance of operations, would have prevented at Conshohocken the kind of beneficial-to-all solution that was negotiated at Youngstown (see Vasko Tr. 928-9; *cf.* Hess A249).

ARGUMENT

Summary of Defendant's Argument

Under Rule 41(b) of the Federal Rules of Civil Procedure, the trial court, sitting without a jury, had the right, on defendant's motion, to give judgment against plaintiffs upon the completion of their evidence if at that time they had shown insufficient facts to establish their right to relief. When plaintiffs finally rested after their third opportunity to present evidence in support of their complaint, the trial court found that they had not established that it was "more likely than not" that the facts were as they had contended and, accordingly, gave judgment against them.

Plaintiffs here claim that the trial court's findings in support of that judgment—particularly with respect to the credibility of the witness Clairmont—are "clearly erroneous" within the meaning of Rule 52(a) of the Federal Rules of Civil Procedure and, therefore, must be set aside. They also claim that the trial court applied the wrong theory of law to the trial of their action and held them to an improperly onerous burden of proof. Finally, they claim that the trial court was overly influenced by an opinion by Judge Walter F. Mansfield on a preliminary aspect of this case and thus failed to try the action *de novo*.

In opposition to these claims defendant has three arguments. (1) As established by the facts set forth above, the trial court's findings are not only not "clearly erroneous" but are, on the contrary, amply supported by substantial evidence and thus, under the law in this Circuit, cannot be set aside. (2) The facts establish that the trial court tried the case on the theory of law specifically presented by plaintiffs (who cannot now be heard to complain otherwise) and imposed the least onerous burden of proof, *i.e.* is it more likely than not that defendant adopted and executed the scheme and "charade" alleged by plaintiffs, rather than imposing "the far more demanding" burden

of proof applied to fraud cases as plaintiffs claim. (3) The record of the trial conclusively shows that the trial court was not overly influenced by Judge Mansfield's opinion, clearly tried the case independently and *de novo*, and, in fact, gave plaintiffs unusual latitude and three separate opportunities to try to establish their case.

I

Plaintiffs' claim that the trial court's findings of fact are clearly erroneous is wholly without merit [answering P. Br. pp. 45-67].

1. The applicable criteria

Rule 41(b) of the Federal Rules of Civil Procedure provides that a trial court sitting without a jury which gives judgment on the merits against the plaintiff upon the completion of the presentation of plaintiff's evidence shall make findings, as provided in Rule 52(a), which "shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses" [see Fed.R.Civ.P. 41(a), 52(a)].*

This Court has consistently held that a finding is not "clearly erroneous" where it is supported by substantial evidence or a credible factual basis in the record as a whole [*Roman Products Corp.* v. *DiCrasto Dairy & Food Products, Inc.*, 361 F.2d 599 (2d Cir. 1966); *Allstate Ins. Co.* v. *Aetna Casualty & Surety Co.*, 326 F.2d 871, 874 (2d Cir. 1964); *Heyman* v. *A.R. Winarick, Inc.*, 325 F.2d 584, 589 (2d Cir. 1963)]. This rule applies to dismissals by the trial court at the close of plaintiff's case under Rule 41(b) [*Huber* v. *American President Lines*, 240 F.2d 778 (2d Cir. 1957); see also *Klein* v. *District of Columbia*, 409 F.2d 164, 168 (D.C. Cir. 1969); *B's Company, Inc.* v. *B. P. Bar-*

* In arguing against defendant's motion to dismiss at the end of plaintiffs' case, plaintiffs' counsel stated (A1421):

> "If your Honor is going to accept what Mr. Clairmont says, then, of course, we have no case to try and no argument to make."

ber & Associates, Inc., 391 F.2d 130, 132 (4th Cir. 1968)]. Moreover, it is particularly applicable where findings are based, as here, on the credibility of witnesses heard and observed by the trial court [*Roman Products Corp.* v. *DiCrasto Dairy & Food Products, Inc., supra*, 361 F.2d 599, 601; *Ruby* v. *American Airlines, Inc.*, 329 F.2d 11, 14 (2d Cir. 1964), appeal vacated as moot, 381 U.S. 277 (1965); *Heyman* v. *AR. Winarick, Inc., supra*, 325 F.2d 584, 585-89; *United States* v. *Wilkens*, 281 F.2d 707, 713 (2d Cir. 1960); *cf. Mazzella Blasting Mat Co.* v. *Vitiello*, 250 F.2d 935 (2d Cir. 1957)].

In a case involving factors of intent and ambiguities not unlike those here presented to the trial court, the Supreme Court of the United States in *United States* v. *National Ass'n of Real Estate Boards*, 339 U.S. 485 (1950), succinctly stated the applicable principles as follows (*id.* at 495-96):

> "It is not enough that we might give the facts another construction, resolve the ambiguities differently, and find a more sinister cast to actions which the District Court apparently deemed innocent. [Citations omitted.] We are not given these choices, because our mandate is not to set aside findings of fact 'unless clearly erroneous.' "

See also *United States* v. *Yellow Cab Co.*, 338 U.S. 338, 341-42 (1949); *United States* v. *Oregon State Medical Society*, 343 U.S. 326, 332 (1952).*

* To counter the above, plaintiffs rely principally on the Court's decision in *Orvis* v. *Higgins*, 180 F.2d 537 (2d Cir.), *cert. denied*, 340 U.S. 810 (1950), where the Court enunciated various principles governing its freedom to set aside trial court findings depending upon the sort of evidence supporting the same (see P.Br. pp. 46-47, 62-63). However, even a cursory reading of that decision discloses its inapplicability in the instant case. In *Orvis*, defendants' denial of an intention to make reciprocal trusts was opposed to all the other evidence, oral and written (see opinion *passim*); in the instant case Clairmont's testimony of his intentions concerning Lee's business as found by the trial court is amply supported by the testimony of other witnesses and contemporary documentary evidence which validate the trial court's evaluation of his credibility based on that court's unique opportunity to hear and see all the witnesses (see pages 42-45, below).

2. The trial court's findings

After finding that plaintiffs "failed to sustain the burden of establishing their above-described 'essential theory' ", *viz.* that the Company, by Clairmont, perpetrated a fraud upon the Union by unilaterally imposing conditions which provoked and forced a strike, thus making it appear that the Company was shut down by the unreasonable Union members striking over simple economic issues, with the intent of permanently closing down operations and never thereafter reopening (see A1496 at 1499-501; pages 4-6, above), the trial court made the following specific findings (A1496 at 1499):

(1) He accepted as credible Clairmont's denial that either he or his Company had the alleged fraudulent intent;

(2) He found that the testimony of Heinrich and Conway was more consistent with the absence than with the presence of the alleged plan to defraud; and

(3) He found that the conceded extrinsic facts were more consistent with the absence rather than the presence of such a plan.

In addition the trial court stated that "Any necessary elaboration on the foregoing findings of ultimate fact will appear in my colloquy with counsel on the making of the third motion to dismiss" (*ibid.*; A1385-6, 1387-439, 1441; *cf.* 1380-1; see pages 6-10, above).

Without purporting to transform the court's remarks during that colloquy into individual statements of fact, the following at least appear to be definite conclusions to which the court had come on the basis of the evidence presented: he found "unequivocally" that Clairmont was "a truthful witness" (A1387); he found Heinrich an entirely truthful witness with respect to the small amount of testimony he was called upon to give (A1388); he found

Conway a truthful witness also except for his present testimony that he had all along believed that Clairmont had from the beginning meant to close the plant (A1388-9; see A1496 at 1500-1); he did not credit that portion of Conway's testimony principally because he found it incredible that, if Conway had in fact then held that opinion, Conway would not have discussed it with someone at that time (A1496 at 1500-1; *cf.* A1389, 1438-9);* he found that the existence of the new tread tuber was known to everyone, Union and management, and was of no importance in resolving the negotiations (A1390-1); he found that at the time the new work rules were promulgated on July 16, 1963, the Company's management had decided it was high time for a strike (A1414); he found that "Clairmont's view was that the old contract was bankrupting the company" (A1421); he found that "the plaintiffs have not persuaded me that it is more likely that Mr. Clairmont precipitated this strike for the purpose of it going for the year and a half to terminate the contract and carry out the plot that plaintiff lays at his door" (A1392); and he found that "on the contrary, the evidence that has been presented to me has left me firmly convinced that it is highly unlikely such should have happened" (*ibid.*).**

In addition to those specific oral findings, the court's colloquy during argument on defendant's second and third motions to dismiss (see Tr. 1789-970 [A1077-124] and A1385-6, 1387-439, 1441) set forth in considerable detail the trial court's reasons for making the findings he ultimately announced (compare *id.* with A1496 at 1500-1).

* In any event, the trial court properly struck all Conway's testimony as to his opinion of anyone else's motives except insofar as that opinion was based on statements made by the person whose motive was under consideration (A1389-90).

** During the colloquy between the trial court and counsel after the second motion to dismiss (see pages 8-9, above), the court also gave many indications of his views of the evidence at that time, some of which plaintiffs have cited to this Court in their brief as findings of the trial court (see Tr. 1789-970 [A1077-124]; P.Br. pp. 7, 17, 19, 34, 36, 42, 49, 53, 56, 65-66). Since the trial court did not incorporate them into his opinion, as he did those made at the conclusion of the case (see A1496 at 1500-1), defendant will not deal with them as findings herein.

3. The trial court's findings, supported by substantial evidence, are not "clearly erroneous."

Plaintiffs concede that if Clairmont's testimony is credited "we have no case to try and no argument to make" (see A1421, A1112). The trial court found "unequivocally" that Clairmont was "a truthful witness" and specifically credited Clairmont's "outright denial that he or his company harbored the necessary fraudulent intent" that plaintiffs were required to establish in order to prove their case (A1496 at 1500). Clairmont made this denial in the Company's annual report for 1963 which he again "subscribed to" at the trial (see Ex. 55A, p. 5 [A1702 at 1706]; Clairmont A942; see A1076-7, 1106, 1108, 1117, 1123-4). In addition, throughout his testimony he made it plain that it was his intention to do everything he could to keep the Company's operations going as long as there was any hope that, with the Union's cooperation, it could be turned into a profitable operation (see, *e.g.*, Clairmont A625, 626-7, 653-4, 661, 675, 678-9, 793-4, 843-5, 885, 955). His testimony and his contemporaneous statements, both oral and written, were that he was not a liquidator (see, *e.g.*, Clairmont A635-7, 845-7; Exs. 30A, p. 5; 32A, p. 1; 101A, p. 1 [A1660 at 1661; 1664; 1889]). And the undisputed evidence is that, when the Union accepted Clairmont's challenge to check that statement, they found it to be true—"there is no doubt about it" (Hess A258-60; see footnote on page 15, above). The mere fact that the Union adamantly refused to accede to the terms which he considered essential to the restoration of the Company's profitability in no way constitutes evidence that Clairmont did not intend to resume operations while there was any possible hope that the Union might be brought to reason (see Clairmont A678, 697, 955; A1439; see footnote on page 19, above).

A multitude of independent testimony and what the trial court described as "conceded extrinsic facts" (see A1496 at 1500) support both Clairmont's credibility and the trial court's ultimate finding that plaintiffs had not

proved the adoption and execution of the scheme they alleged as the "essential theory" of their case (see Point II, pages 48-49, below). These facts have been set forth in great detail at pages 11-36, above, with reference to each person or document which supports the particular fact. A review of these references establishes the overwhelming support that exists in the record for the conclusions to which the trial court came and provides a graphic picture of the manner in which Clairmont's testimony was repeatedly supported by the contemporary documents and the testimony of his adversaries.

In addition, various undisputed facts, or actions, or occurrences, call them what you will, which strongly support Clairmont's testimony about his determination to restore the Conshohocken plant to its former profitability, are basically inconsistent with the plaintiffs' theory and obviously influenced the trial court in its conclusion that the evidence did not support the plaintiffs' case. For example, if Clairmont had, from the time he decided to take over the Company's management, intended to cease operations as soon as he could rid himself of the Special Distribution liability—as plaintiffs charge (see P.Br. pp. 13-14, 66-67)—why did he personally attend the meetings at which he tried so hard to convince the Union to go along with his operating proposals (see pages 19-21, 22, 27-28, above; A1103-5, 1121); why did he repeatedly offer the Union an "open door" to the Company's management and its records (see Clairmont A639-41; Garber A552-5; Exs. 30A, p. 4; 90A, pp. 2, 9-10; 93A [A1660 at 1660-3; 1802 at 1803, 1810-1; 1821-40]; see page 20, above); why did he bother to assemble a new management team, including persons like Heinrich and Garrett and Barkett (see pages 16-17, above; A1092, 1093, 1121); why did he personally paint so "rosy a picture" to Barkett to lure him away from a secure position (see footnote on page 16, above); why, in the midst of a drive to cut to the bone all unnecessary overhead, did he unhesitatingly approve the expenditure of $200,000 to complete the installation of the new tread tuber (see footnote on page 8; pages 17-18; and see-

ond footnote on pages 22-23, above; A1079, 1082, 1119-20, 1391-2); why did he install a private telephone wire to the Conshohocken plant and keep in constant touch with operations and developments there (see Heinrich A1021; Conway A1157-8; A1093); why did his Executive Vice President, Heinrich, work such "awful long hours" at the plant (see Conway A1158; *cf.* Ex. 32A, p. 1 [A1664]); why did he keep Conway on as his chief negotiator since Conway would obviously be unsympathetic to his intended fraud (see A1438); why did he personally open the negotiations with a plea for reasonableness and good judgment and the July 3 session with a serious proposal for productivity sharing (see pages 22, 27-28, above); why did he care about keeping other than maintenance people in the plant (see page 33, above; A1097); why did he care about enjoining the picketing (*ibid.*; A1091)?

Finally, the NLRB's refusal to issue a complaint on the Union's amended charge that the Company was refusing to bargain in good faith (see pages 30-31, above), the present general acceptance of key job classification clauses and co-termination of Working and Welfare Agreements (see footnotes on pages 18 and 23-24, above), and the Union's willingness to allow Goodyear a complete job evaluation at Conshohocken and to give Aeroquip in Youngstown a contract containing most of the relief they had refused to Clairmont (see footnote and text on page 36, above) support the Company's position that its negotiating demands were not unreasonable and are inconsistent with plaintiffs' claim that they were deliberately designed for non-acceptability for a fraudulent purpose rather than for relief required to make Conshohocken a viable economic operation (see P.Br. pp. 10-11, 13-17).

From all of the above, it is obvious that the trial court's findings and conclusions, including those on credibility, are supported by substantial evidence and not "clearly erroneous" within the meaning of Rule 52(a). Even if this Court "might give the facts another construction, re-

solve the ambiguities differently, and find a more sinister cast to actions which the District Court apparently deemed innocent," it may not set the findings aside on the record in this case (see *United States v. National Ass'n of Real Estate Boards, supra,* 339 U.S. at 495-96).

4. Plaintiffs' objections to the findings are without merit.

Plaintiffs' claims that the trial court's findings must be set aside as "clearly erroneous" appear to rest on two distinct grounds: (1) the trial court credited the testimony of Clairmont although it was "unable to evaluate it," improperly considered it corroborated by evidence not in the record, and overlooked the fact that it was incredible *per se* because "evasive and contradictory" and completely negated by the contemporaneous documents (see P.Br. pp. 47-48, 50-62); and (2) the trial court never found that the Company intended to reopen after the work stoppage (*id.* pp. 63-64, 65-66).

With respect to the attack on Clairmont's credibility, defendant's position as to the correctness of the trial court's findings that Clairmont was a credible witness is fully set forth at pages 42-45, above. The claim that the trial court was "overawed" by Clairmont and thus unable to evaluate him as a witness (see P.Br. pp. 49-52) is patent nonsense. That the court was not overawed or unable to evaluate Clairmont's testimony is clearly established (1) by his acknowledgment of the extra scrutiny he felt he should give to Clairmont's testimony (see A1387-8, 1428); and (2) by the occasional instances in which he did not credit Clairmont's present recollection of past events or feelings (see A1076, 1100; see also 229, 321-2, 1389).

Plaintiff's claim that the trial court, "having been unduly impressed by Clairmont as a witness and feeling the need for corroboration of the same," found that corroboration in testimony not actually in the record is also

nonsense (compare P.Br. pp. 50-52 with A1427-30). The trial court merely stated to plaintiffs' counsel that, not wishing to rely "too heavily" on Clairmont, it had found corroboration for Clairmont's views and testimony in the testimony of Heinrich (A1428). To plaintiffs' counsel's challenge that Heinrich had not testified as to anything except the tread tuber and thus could not corroborate Clairmont in other "areas" (*ibid.*), the trial court simply remarked that it could not remember Heinrich's testimony "in detail," that his "recollection" of Heinrich's testimony was "that it was contrary to this theory of yours," but that he would "check it" (A1428-9).

Thereafter, the trial court's memory was refreshed that, in addition to his testimony about the $200,000 appropriation for the new tread tuber, Heinrich had also testified about the private telephone line between the plant and Clairmont and Clairmont's interest in what was going on in Conshohocken (A1428-30; see also Heinrich A1007-16, 1019-24, 1027-8; Ex. 125A [A1916]). All of Heinrich's brief testimony corroborated Clairmont's testimony in various respects, and there is no evidence that in arriving at its findings in this case the trial court considered anything not contained in the record thereof (see A1092, 1093, 1119, 1120-1, 1122, 1430).*

Finally, plaintiffs' contention that they are entitled to recover solely upon proof "that the close-down was a lockout instituted by the Company with no effort to terminate that lockout" (P.Br. pp. 65-66; see 63-65; *cf.* 36-37) is entirely erroneous. As acknowledged at the trial, the Company was just as entitled to impose new working conditions

* Plaintiffs also contend that Clairmont's stock purchases after he assumed the management of Lee served to "destroy" his "entire credibility" (P.Br. pp. 58-59; see 20-21). However, a review of his direct and indirect stock purchases at these times reveals that he did not significantly increase his holdings or buy a "tremendous amount of stock from unsuspecting stockholders" (compare P.Br. p. 62 with Exs. 60 (A)(1)-(9), 62A [A1731-44, 1746-66]). In any event, the court found that his reports filed with the SEC disposed of plaintiffs' claim (A1111, 1118).

which resulted in a work stoppage in order to obtain from the Union terms it deemed essential to its continued operation as the Union would have been to have struck the Company in support of its own demands (see footnote on pages 29-30, above). Thereafter, providing it was willing to continue to meet with the Union and consider any changes in position which the latter offered (see pages 31-32, above), the Company had no obligation to recede from its requirements, and its failure to do so is no evidence that it was not prepared to resume operations if the Union met those requirements.*

In any event, while there is evidence from which the trial court could have found affirmatively that the Company did intend to reopen (see pages 31-33, 34, 43-44, above), it was not incumbent upon the Company to prove, nor the trial court to find, such intention but upon plaintiffs to prove the contrary (see A1117, 1122, 1392, 1437-8, 1439). Hess's claim that at some unspecified negotiating session the Company refused a Union offer to accept all the Company's demands, stating that it came "too late; the axe has fallen," represents plaintiffs' only attempt to prove directly a "pre-Welfare Agreement-termination" decision by the Company never to reopen (see Hess A129-30, 172, 192-7, 205-6, 208, 213, 219-26, 235, 241-4, 273-7, 278-80, 293-300). This attempt failed because of Hess's inability to produce any supporting evidence for this highly important offer and refusal and his acknowledgment that he had never brought it to the federal mediator's attention (or to the NLRB) and asked him to "call off this farce" (see A243-4, 253-4, 279, 321-2, 1114-1 to 1114-2).

Despite plaintiffs' complaints about the trial, the evidence clearly supports the trial court's findings, including those on general credibility, and so supported they may not here be set aside.

* In this connection, see the NLRB's refusal to issue a refusal to bargain charge against the Company well after the strike began (see pages 30-31, above).

II

The court tried the case on plaintiffs' chosen theory and applied the proper burden of proof thereto [answering P.Br. pp. 36-38].

Plaintiffs claim that they instituted this action as a breach of contract but that the trial court—trepanned by "Mansfield's 'essential fraud theory' "—tried it as a fraud action and thus imposed "a far heavier burden of proof on Plaintiffs than was proper" (see P.Br. 36, 37-38). Nothing could be less accurate.

In the first place, plaintiffs themselves first described the theory of their action in a memorandum of law to Judge Mansfield in opposition to the Company's motion for partial summary judgment, and Judge Mansfield simply adopted it in his opinion on that motion as the following comparison shows:

"The essential theory of the plaintiffs' case is that the defendant company perpetrated a fraud upon the unions by unilaterally imposing conditions upon the union which forced a strike thus making it appear that the Company was shut down by unreasonable organized employees over simple economic issues" (Plaintiffs' Memorandum in Opposition to Motion for Summary Judgment, p. 2).

"The essential theory of the Union's case is that the Company perpetrated a fraud upon its Local by unilaterally imposing conditions which provoked and forced a strike, thus making it appear that the Company was shut down by unreasonable Union members striking over simple economic issues" (Judge Mansfield's Opinion, A1442 at 1452).

In the Pre-Trial Order, plaintiffs described the issue to be tried in similar terms (PTO, A1484-5), and at the very opening of the trial they moved to amend their complaint to allege "what Judge Mansfield said you have to do in order to prevail" (A79-80). Since the issue framed by the plaintiffs was the issue tried by the court, plaintiffs seem to have no legitimate complaint—particularly since it appears clear that had they proved their theory the court would have held that they had established their breach of contract claim (see Tr. 1951-2; A1122).

As for the burden of proof imposed on plaintiffs, the trial court clearly required them to meet only the customary burden of persuasion—that "the existence of the contested fact is more probable than its non-existence" (see McCormick, Evidence, §339 (2d ed. 1972); A1122, 1392, 1437-8). In discussing its reaction to the proof, at the argument on the motion to dismiss when plaintiffs rested for the second time (see pages 7-9, above), the trial court practically recited that exact formula when he told plaintiffs (see A1122):

> "What you have to prove is that it is more likely than not that this [plaintiffs' alleged scheme and "charade"] happened, and my reaction is that it is more unlikely than not that it happened."

Had plaintiffs had any reason to complain that an improper burden of proof was being imposed upon them that was the time to set things right. Another opportunity arose when, just before plaintiffs' argument at the end of their third presentation of evidence (see pages 9-10, above), the trial court said (see A1392):

> "So I find that the plaintiffs have not persuaded me that it is more likely that Mr. Clairmont precipitated this strike for the purpose of it going for the year and a half to terminate the contract and carry out the plot that plaintiff lays at his door. On the contrary, the evidence that has been presented to me has left me firmly convinced that it is highly unlikely such should have happened, and I therefore intend, unless my view is changed by arguments presented, to dismiss the case." (See also A1437-8, 1439).

Since plaintiffs never voiced to the trial court any disagreement with the burden of proof that he was applying to them and since, in fact, he was applying the least onerous burden available, plaintiffs' complaint about the burden of proof is unfounded.

III

The trial court was not improperly influenced by Judge Mansfield's opinion and tried the case *de novo* [answering P.Br. pp. 38-44].

The substance of Judge Mansfield's opinion on defendant's motion for partial summary judgment is summarized on pages 5-6, above. It set forth plaintiffs' own "essential theory" of their case—the alleged fraudulent scheme and "charade" to mask Clairmont's previously made decision to close the Conshohocken plant (see page 48, above). Judge Mansfield decided that plaintiffs had a right to try to establish the factual existence of that scheme and "charade" despite his opinion, on the basis of the affidavits and documentary evidence submitted to him on the motion he was deciding, that plaintiffs would have "almost no chance at all of sustaining this heavy burden" of proving that "the discontinuance of plant operations by the Company actually occurred at or about the time the strike commenced, which was on July 16, 1963, rather than on November 30, 1964, when the Company's Board voted to discontinue operations" (see pages 5-6, above; A1442 at 1452-3). He described the plaintiffs' claim as "flimsy" and "a belated rationalization" inconsistent with its earlier positions that the discontinuance had occurred on December 14, 1964, or even later (*id.* at A1453-4). While he was clearly not optimistic about plaintiffs' chances of success, he nevertheless sent plaintiffs' issue to trial (*ibid.*).

Plaintiffs now claim that in trying this factual issue Judge Knapp "continually bowed to Judge Mansfield's highly skeptical attitude towards Plaintiffs' case" which, in addition to creating a "psychological burden" for plaintiffs, "quite likely" persuaded the trial court that plaintiffs could not and should not succeed, and "may have" caused the trial court to have a "potentially" biased outlook which created an "unconscionable burden" on plaintiffs (see P. Br. pp. 38, 39, 44). None of this speculation is supported by

record evidence, and in fact, all the record evidence is to the contrary.

It is, of course, true—and understandable—that Judge Knapp was familiar with Judge Mansfield's prior decision on an aspect of the case (see A80). What capable trial judge would not be? But during the very opening moments of the case Judge Knapp assured plaintiffs' counsel that he would not "be bound by a fellow judge's optimistic or pessimistic statements" (A80-1), and later, at the beginning of plaintiffs' argument in opposition to the motion to dismiss following plaintiffs' second resting (see pages 8-9, above), Judge Knapp clearly stated his knowledge that "the cases are quite clear that my obligation is not to be bound by Judge Mansfield's opinion except insofar as I think he was correct" (A1074-5; see also 373-4).

Judge Knapp's initiation of that argument by the question "What have you proved that was not before Judge Mansfield?" (A1073), far from supporting plaintiffs' claim of improper influence (see P.Br. p. 39), was simply a device to marshal any additional significant facts which had, in plaintiffs' opinion, been presented at the trial (see A1095; see, *e.g.*, A1075, 1085-6, 1096; Tr. 1815, 1848-55). And when, thereafter, plaintiffs' counsel came up with at least one fact which had been in defendant's affidavit before Judge Mansfield but was not before the trial court, Judge Knapp immediately agreed that that fact could not provide a basis for granting the motion to dismiss (see Tr. 1858-61, 1948-50; *cf.* A1442 at 1452-3).

Thus, there is no persuasive evidence that the trial court "continually bowed to Judge Mansfield's highly skeptical attitude towards Plaintiffs' case" (see P.Br. pp. 38-39). On the contrary, the record is replete with Judge Knapp's insistence on satisfying himself on every score, and it is far more likely that Judge Knapp came himself at the close of the case to the conclusion of "the high impossibility of the plaintiff's theory—I think it is your theory—that Clair-

mont bought in knowing he had to close this plant, if I recollect your argument" than that he was "bowing" to Judge Mansfield's previous opinion on the difficulties confronting plaintiffs (compare P.Br., pp. 39-40, with A1390).*

Finally, plaintiffs' contention that the trial court failed to try the case *de novo* is baseless and contrary to the record (see P.Br. p. 44). Not only does the record show that the court went out of its way to allow plaintiffs complete latitude to produce any witnesses and evidence they wished (see A79-1386 *passim*), it also shows that the court once allowed plaintiffs to reopen their case despite the fact that they had rested, on the ground that they should be given an opportunity to cross-examine the Company's witnesses if they felt it necessary to establish their case (A606-7; see 1496 at 1497-8). It further shows that the court later weighed the necessity to reopen the case, after it had announced its decision to dismiss it, for further proof of the significance of the tread tuber (see page 9, above), and that when the court decided, after considering briefs from both sides, that such reopening was unnecessary, it nonetheless *sua sponte* suggested (and permitted) that the case be reopened again, this time to hear an additional witness whom the court felt "would almost surely have had access to evidence of any conspiracy against plaintiffs that might have existed" and "whose sympathies would most

* As for Judge Mansfield's opinion that plaintiffs' theory appeared to be only "a belated rationalization" inconsistent with plaintiffs' previously expressed opinions as to when the discontinuance of operations occurred (see A1442 at 1453-4; see pages 4-6, above; Ex. 75A [A1790-1]), Judge Knapp took an entirely independent—and correct—position. He acknowledged Judge Mansfield's statement and stated categorically his view that plaintiffs' theory was in fact "an afterthought" (A1099-100, 1102); he stated that that fact, however, did not mean that the theory was untrue (*id.*, A227-8; *cf.* 1088, 1102; Tr. 1814); and he concluded that, nevertheless, the fact that the afterthought was inconsistent with prior positions taken in writing by the plaintiffs was relevant to the question as to what people involved thought were the facts at the time they were transpiring (A1100; see also Tr. 908-10; Ex. 75A [A1790-1]).

This is precisely the Company's point.

surely be with plaintiffs'' (A1492-3, 1496 at 1498-9; A1126-385; see pages 9-10, above).

In the face of all these actions, it is difficult to imagine what more it would take to try this case *de novo*.

Conclusion

For all the above reasons, this Court should affirm the judgment of the District Court herein.

Dated: New York, New York
December 30, 1974

Respectfully submitted,

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Service of 8 copies of the
within Brief is hereby
admitted this 27th day of
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Signed Sheldon Nolan
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